Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

DOCTOR JONG HI BEK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari
To The Seventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether this Court's decision in *Jaffe v. Redmond*, 518 U.S. 1 (1996), regarding psychotherapist-patient privilege, and the privacy rules of the Health Insurance Portability and Accountability Act (HIPAA) create a privacy interest in the medical records of a patient, such that said medical records cannot be disclosed in court proceedings without the patient's authorization?

PARTIES TO THE PROCEEDINGS

In accordance with S.Ct. Rule 14(b), the Petitioner states that the caption of the case contains the names of all the parties in this Petition.

CORPORATE DISCLOSURE STATEMENT

In accordance with S.Ct. Rule 14(b) and S.Ct. Rule 29.6, the Petitioner states that this document is not being filed on behalf of a non-governmental corporation, that there are no parent corporations, and that there is no publicly held company that owns 10% or more of the stock of any corporate party.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is published.

The judgment of the United States District Court appears at Appendix B to the petition and is unpublished.

STATEMENT OF JURISDICTION

On July 6, 2007, the United States Court of Appeals for the Seventh Circuit, in a published opinion, affirmed in part and reversed in part the District Court's judgment and sentence in this cause. This Petition for Certiorari is being filed within 90 days of the final judgment of the Court of Appeals for the Seventh Circuit. Jurisdiction is invoked under Title 28 United States Code §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

21 U.S.C. § 841

(a) Unlawful acts
Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

21 U.S.C. § 846

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

28 U.S.C. Appx. Rule 501

Except as otherwise required by the Constitution of the

United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

45 C.F.R. § 164.508

(a) Standard: authorizations for uses and disclosures—

(1) Authorization required: general rule. Except as otherwise permitted or required by this subchapter, a covered entity may not use or disclose protected health information without an authorization that is valid under this section. When a covered entity obtains or receives a valid authorization for its use or disclosure of protected health information, such use or disclosure must be consistent with such authorization.

(2) Authorization required: psychotherapy notes. Notwithstanding any provision of this subpart, other than the transition provisions in § 164.532, a covered entity must obtain an authorization for any use or disclosure of psychotherapy notes, except:

(i) To carry out the following treatment, payment, or health care operations:

(A) Use by the originator of the psychotherapy notes for treatment;

(B) Use or disclosure by the covered entity for its own training programs in which students, trainees, or practitioners in mental health learn under supervision to practice or improve their skills in group, joint, family, or individual counseling; or

(C) Use or disclosure by the covered entity to defend itself in a legal action or other proceeding brought by the individual; and (ii) A use or disclosure that is required by § 164.502(a)(2)(ii) or permitted by § 164.512(a); § 164.512(d) with respect to the oversight of the originator of the psychotherapy notes; § 164.512(g)(1); or § 164.512(j)(1)(i).

(3) Authorization required: Marketing.

(i) Notwithstanding any provision of this subpart, other than the transition provisions in § 164.532, a covered entity must obtain an authorization for any use or disclosure of protected health information for marketing, except if the communication is in the form of:

(A) A face-to-face communication made by a covered entity to an individual; or

(B) A promotional gift of nominal value provided by the covered entity.

(ii) If the marketing involves direct or indirect remuneration to the covered entity from a third party, the authorization must state that such remuneration is involved.

STATEMENT OF THE CASE

The Defendant, **DR. JONG HI BEK**, was charged in Counts 1-24 of a twenty four (24)-count Indictment returned by a grand jury in this district on August 22, 2003. On April 22, 2004, the Defendant was charged in Counts 1-23 and 25-27 of a twenty-six (26)-count Superseding Indictment returned by a grand jury in this district. Defendant pleaded not guilty to all counts of the Indictment on April 29, 2004 and proceeded to a jury trial. The jury trial commenced on May 16, 2005. On May 27, 2005, the Defendant was convicted on Counts 1-23 and 25-27. Count 1 charges the Defendant with a violation of 21 U.S.C. § 846, Conspiracy to Distribute Controlled Substances. Count 2 charges the Defendant with a violation of 21 U.S.C. § 841(a)(1), Distribution of Controlled Substances. Counts 3 - 23 charge the Defendant with a violations of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, Distribution of Controlled Substances and Aiding &Abetting. Counts 25 and 26 charge the Defendant with a violations of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, Distribution of Controlled Substances and Aiding & Abetting. And Count 27 charges the Defendant with a violation of 18 U.S.C. § 1347 & 2, Health Care Fraud and Aiding & Abetting.

Bek was sentenced on October 14, 2005. The sentence imposed was forty-one (41) months on each of Counts 1 - 23 and 25-27 to run concurrently. These terms of imprisonment are to be followed by two (2) years of supervised release on Counts 1 - 23, 25 and 26 and two (2) years of supervised release on Count 27 to run concurrently. The District Court entered a special assessment of $2,600.00 and restitution of $158.82. Further, the District Court entered a final forfeiture order on deposits in Bank One, Indiana Account Number 15636327726.

Bek began to serve said sentence on November 14, 2005.

On October 20, 2005, a timely notice of appeal to the Court of Appeals for the Seventh Circuit was filed by Bek. On July 6, 2007, the United States Court of Appeals for the Seventh Circuit affirmed in part and reversed in part the District Court's judgment and sentence.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

This is a prosecution brought by the United States alleging a violation of 21 U.S.C. § 846, 21 U.S.C. § 841(a)(1), 18 U.S.C. § 2, and 18 U.S.C. § 1347. The United States District

Court for the Northern District of Indiana had jurisdiction pursuant to 18 U.S.C. §3231, giving District Courts of the United States original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

REASONS FOR GRANTING THE PETITION

I. This Court's decision in *Jaffe v. Redmond*, 518 U.S. 1 (1996), regarding psychotherapist-p tient privilege, and the privacy rules of the Health Insurance Portability and Accountability Act (HIPAA) create a privacy interest in the medical records of a patient, such that said medical records cannot be disclosed in court proceedings without the patient's authorization.

This Court should grant review in this case because it involves an important question of federal law that has not, but should be, settled by this Court. Federal Rule of Evidence 501 directs that, if state law governs, (e.g., diversity case), then the court is directed to use state law as to admissibility of evidence. If the case is before the court on a federal question, use federal law. *Morgan v. Union Pacific R.R.*, 182 FRD 261 (7th Cir. 1998). The federal common law, through approximately 1996, was fairly consistent that a physician-patient privilege did not exist. Consequently, it was held under those cases that doctors under investigation for drug issues cannot raise the physician-patient privilege to defeat a grand jury subpoena for records. *In re Grand Jury*

Proceedings, 801 F2d 1164 (9th Cir. 1986). Decisions from several circuits supported this position, including the Seventh Circuit in *Patterson v. Caterpillar, Inc.*, 70 F.3d 503 (7th Cir. 1995) ("Unfortunately for Mr. Patterson, federal common law does not recognize a doctor-patient privilege," citing other cases.)

However, at approximately this same time period from 1994-1996, some circuits broke with the general rule, and carved out a rule for a psychotherapist-patient privilege. Notably, this included the Seventh Circuit in *Jaffee v. Redmond*, 51 F.3d 1346 (7th Cir. 1995). This case was appealed to this Court on a number of grounds, and in *Jaffee v. Redmond,* 518 U.S. 1 ***(1996)***, this Court announced a new rule, specifically that federal law now recognizes a psychotherapist-patient privilege. Furthermore, the decision also announced that F.R.E. 501 allowed courts to "continue the evolutionary development of testimonial privileges". *Jaffe* at 18. The opinion suggested that such development should be guided by and attuned to state and federal legislative acts, and noted that all 50 states now had a law regarding the psychotherapist-patient privilege, the fact of which was reflective of such a need. This opinion abrogated cases such as *US v. Corona*, 849 F2d 562 (11th Cir. 1988), and others

that had denied the existence of such a psychotherapist-patient privilege.

Since this holding, federal courts in each district have sought to determine what additional privileges may or may not fall under Federal Rule 501, as well as to determine how broadly to apply the ruling in *Jaffe*. One such issue that has been reviewed by a number of courts since the inception of *Jaffe*, and that logically follows from this Court's decision in *Jaffe*, is whether medical records are privileged. In *Newton v. Kemna*, the Eighth Circuit held that medical records "almost certainly fall squarely within the scope of the federal psychotherapist-patient privilege." 354 F.3d 776, 783-784 (8th Cir. 2004). In *U.S. v. Hayes*, the Sixth Circuit affirmed the District Court's judgment granting a defendant's motion to suppress psychotherapist's medical records, finding that said medical records are privileged. 227 F.3d 578 (7th Cir. 2000).

Further, the United States District Court of the District of Massachusetts created a new privilege based on this court's decision in *Jaffe*: a federal privilege for rape counseling records. *U.S. v. Lowe*, 948 F. Supp. 97, 99 (D. Mass. 1996). Yet, the Seventh Circuit, in reversing the district court's decision, declined to recognize a new privilege for abortion records, stating that the Seventh Circuit is "reluctant to

embark on a case-by-case determination of the relative sensitivity of medical records of different ailments or procedures." *Northwestern Memorial Hosp. v. Ashcroft*, 362 F.3d 923, 926 -927 (7th Cir. 2004). However, the United States District Court for the Southern District of Indiana holds that Federal Rule of Evidence 501 "provides for flexible and case-by-case development of the law of privilege in federal courts, not mechanical freezing of privilege as it existed at common law." *In re August 1993 Regular Grand Jury (Medical Corp. Subpoena II)*, 854 F.Supp. 1392 (S.D. Ind. 1993).

Another issue that logically follows from this Court's decision in *Jaffe* is whether the psychotherapist-patient privilege is expanded to include any type of physician, and not only therapists and social workers. This Court has long acknowledged the importance of a doctor-patient privilege: The doctor-patient privilege is "rooted in the imperative need for confidence and trust.... [T]he physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment. *Trammel v. U.S.*, 445 U.S. 40, 51 (1980).

In *Doe v. Oberweis Dairy*, the Seventh Circuit acknowledges the federal psychotherapist-patient privilege and states that the privilege is "intended like the closely

related doctor-patient privilege to avoid deterring people from seeking treatment by fear that by doing so they will incur a disadvantage in litigation." 456 F.3d 704, 718 (7th Cir. 2006). The Fifth Circuit has long acknowledged the physician-patient privilege *In re Dinnan*, 661 F.2d 426, 428 (5th Cir. 1981). ("a physician-patient privilege exists in order to insure that one is not penalized for seeking medical help.") Yet, the Sixth Circuit, in overruling the district court's ruling, declines to recognize the a physician-patient privilege ("The magistrate judge erred in concluding that the Sixth Circuit would recognize a doctor-patient privilege under federal common law.") *Mann v. University of Cincinnati*, 114 F.3d 1188 (6th Cir. 1997).

Further, some federal courts have recognized a constitutional privacy interest of the patients in their records. In *Whalen v. Roe*, 429 US 589 (1977), this Court, in a footnote, refers to the lack of any federal common law physician-patient privilege, but acknowledges that the patients have a privacy interest in their medical records. This was also discussed in *Doe v. South Eastern Penn. Transit Authority*, wherein the court ruled that an employee has constitutional right to privacy in health records containing AIDS information. 72 F3d 1133 (3rd Cir. 1995).

Recognizing the need for privacy of medical information in an age of high tech availability of records, Congress passed the Health Information Portability and Accountability Act of 1996, (HIPAA) 42 U.S.C. 1320, and 45 CFR Parts 160, 164. The Act essentially codifies a right of privacy for the patient in medical records and information, and provides a number of safeguards for the protection not only of medical records, but of all types of information. There now exists federal legislation mandating the confidentiality of patient records. A standardized form for a HIPAA Qualified Protective Order indicates that the entity providing the information with regard to a court proceeding is protected, and that the records may be used in conjunction with pending litigation. The form notes, however, that the Protective Order is not an authorization to release records, and that the parties must receive appropriate authorization and release from the patient in order to initially obtain the records.

Nearly every state now has laws regarding confidentiality of patient records. Further, most states provide that a doctor who violates the confidentiality requirements can lose his license. Indiana Administrative Code 844 I.A.C. 5-2-2 mandates a doctor to maintain the confidentiality of his patient's records and all knowledge and information.

Since the passage and effectiveness of HIPAA, not many cases have construed its parameters. However, a few cases indicate that a court is to balance the harm to the state versus the patient's interests. *In Re Grand Jury Subpoena*, 197 F. Supp.2d 512 (E.D. VA 2002). *Whalen v. Roe*, supra, and *Doe v. South Eastern Penn. Transit Authority*, supra.

In these cases, even though the HIPAA laws had been passed but were not yet in effect, the courts viewed the pending legislation as an expression of legislative intent and direction. The court noted that, under HIPAA, the patient's privacy is "trumped" by a Grand Jury Subpoena relevant to a legitimate law enforcement inquiry, (citing 45 CFR 164.512 (f)(ii)). Based on this interpretation, the Court held that the records should be produced but limited its position. The court noted that the opinion was limited, that this is not a rule for all, but directed that these situations must be viewed on a case-by-case basis. Interestingly, the court also noted that, in that particular instance, the provisions for "grand jury secrecy" further protected the disclosed information. The question was left open as to how this might apply to a public trial in a subsequent criminal proceeding.

The District Court in *In Re Grand Jury Subpoena* also cited another similar analysis in *U.S. v. Sutherland*. 143

F.Supp 2d 609 (W.D. Va, 2001). In *Sutherland*, also, there was a government subpoena to a hospital pharmacy during the trial of a doctor on charges of unlawful distribution of controlled substances for no medical purpose. The hospital moved to quash. The court held that the Government had a compelling interest, but it could not disclose records at trial without giving the patients an opportunity to object and move to quash. The court made the analysis that the federal and state laws provide for medical privacy. The Court also provided litigants with subpoena power for non-party witnesses, but paired with the ability to object and file a Motion to Quash. Similarly, the court also acknowledged that, while there is no federally recognized doctor-patient privilege, the federal court cases have indicated a privacy right in medical records. (Also citing *Whalen* and *Doe v. South Eastern*, supra.) The opinion finally held that the patients whose records would be used at a trial would have to be given notice and an opportunity to object, or prosecution would have to show good cause why they should not be. The court specifically analyzed the type of court order as to how it reflected on the dissemination of records.

Finally, in *Lovato v. Burlington Nor. & Santa Fe* R.R., the district court in Colorado recognized the physician client

F.Supp 2d 609 (W.D. Va, 2001). In *Sutherland*, also, there was a government subpoena to a hospital pharmacy during the trial of a doctor on charges of unlawful distribution of controlled substances for no medical purpose. The hospital moved to quash. The court held that the Government had a compelling interest, but it could not disclose records at trial without giving the patients an opportunity to object and move to quash. The court made the analysis that the federal and state laws provide for medical privacy. The Court also provided litigants with subpoena power for non-party witnesses, but paired with the ability to object and file a Motion to Quash. Similarly, the court also acknowledged that, while there is no federally recognized doctor-patient privilege, the federal court cases have indicated a privacy right in medical records. (Also citing *Whalen* and *Doe v. South Eastern*, supra.) The opinion finally held that the patients whose records would be used at a trial would have to be given notice and an opportunity to object, or prosecution would have to show good cause why they should not be. The court specifically analyzed the type of court order as to how it reflected on the dissemination of records.

Finally, in *Lovato v. Burlington Nor. & Santa Fe* R.R., the district court in Colorado recognized the physician client

privilege arising out of HIPAA. 200 F.R.D. 448 (D. Colo. 2001). The original decision by the Magistrate, which was reversed, cited *Whalen* for the proposition that there was no doctor-client privilege. Upon review, the court declared, as part of a ruling in a discovery dispute, that HIPAA had now created or codified a physician-client privilege in the federal court, and that the scope of such privilege was identical (in that case) to the scope of the Colorado state privilege.

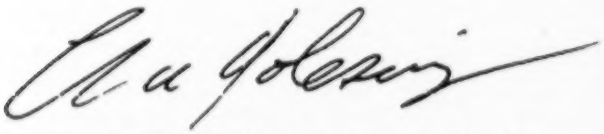
Dr. Bek acknowledges that prior federal common law did not recognize a doctor-patient privilege, although it does now recognize a psychotherapist-patient privilege. The difference between physical health and mental health is a short step. Due to this Court's ruling in *Jaffe*, as well as previous its ruling in *Trammel*, this Court could find that a physician-patient privilege exists. Said finding would greatly reduce the confusion amongst the federal courts, as it would create a uniform rule of law, which is much needed in this area.

CONCLUSION

Dr. Bek respectfully requests this Court to grant his Petition for Writ of Certiorari. The discrepancies in the federal

courts regarding whether a federal physician-patient privilege exists, whether a patient has a federal common law privacy interest in his medical records, and whether HIPAA creates a privacy interest in a patient's medical records point to the need for a clear, steadfast ruling from this Court. A ruling from this Court clearly defining a physician-patient relationship as privileged will serve to prohibit the dissemination of private medical records in public court proceedings, thereby allowing patients to have confidence and trust with their physicians in order to facilitate proper diagnosis and treatment. Consequently, this important issue should be reviewed by this Court.

Respectfully Submitted,



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